



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

May 22, 2003

Mr. Jesus Toscano, Jr.  
Administrative Assistant City Attorney  
Dallas Police Department  
1400 South Lamar Street  
Dallas, Texas 75215-1801

OR2003-3447

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181451.

The City of Dallas (the "city") received two requests for information concerning a specified period of time and pertaining to a contract to collect court fines and fees. You state that some responsive information will be provided to both requestors. You claim that some of the requested information is excepted from disclosure pursuant to section 552.107 of the Government Code. Although the city does not take a position with regard to the release of the remaining requested information, the city claims that this information may be subject to third party confidentiality claims. Pursuant to section 552.305(d) of the Government Code, the city notified an interested third party, Linebarger Goggan Blair & Sampson, LLP, ("Linebarger"), of the city's receipt of the request and of Linebarger's right to submit arguments to this office as to why information relating to Linebarger should not be released to the requestors. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances). We have considered all arguments and have reviewed the submitted information, which includes representative sample documents.<sup>1</sup> We have also considered comments submitted

---

<sup>1</sup> We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open

by representatives of the requestors. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Section 552.107(1) protects information that is encompassed by the attorney-client privilege. When asserting the attorney-client privilege, a governmental body maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *see id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *See id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Based on our review of your representations and the submitted information that the city claims to be excepted from disclosure under section 552.107, we agree that this information reflects confidential communications provided to the city in furtherance of the rendition of

---

records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

legal services to a client. Accordingly, we conclude that the city may withhold this information in its entirety pursuant to section 552.107(1) of the Government Code.

We now address the remaining submitted information which constitutes the bid proposal submitted by Linebarger in response to "Request for Bid No: BJ0212." Linebarger argues that the financial information pertaining to Linebarger that is contained within the proposal is proprietary and confidential because Linebarger submitted this information to the city with the expectation that it would be kept confidential by the city. We note, however, that information is not considered to be confidential under the Act simply because the party submitting it to the governmental body anticipates or requests that it be kept confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See Attorney General Opinion JM-672* (1987); *see also* Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless this information is encompassed by applicable exceptions to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

Linebarger also argues that portions of its proposal constitute commercial or financial information the release of which would cause Linebarger substantial competitive harm under section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Based on our review of Linebarger's arguments and the portions of the submitted bid proposal that it claims to be excepted from disclosure under section 552.110(b), we find that Linebarger has sufficiently demonstrated that most of this information constitutes commercial and financial information the release of which would cause Linebarger substantial competitive harm. Accordingly, we conclude that the city must withhold the information that we have marked within the bid proposal pursuant to section 552.110(b) of the Government Code.

We note that the remaining submitted portions of the bid proposal contain an e-mail address that may be excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 requires the city to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the city, unless the members of the public with whom the addresses are associated have affirmatively consented to their release. Accordingly, we conclude that the city must withhold the e-mail address that we have marked within the remaining portions of the submitted bid proposal pursuant to section 552.137 of the Government Code, unless the member of the public with whom it is associated has affirmatively consented to its release.

In summary, the city may withhold the entirety of the submitted information that the city claims to be excepted under section 552.107 under that particular exception to disclosure. The city must withhold the information that we have marked within the submitted bid proposal pursuant to section 552.110(b) of the Government Code. The city must also withhold the e-mail address that we have marked within the remaining portions of the submitted bid proposal pursuant to section 552.137 of the Government Code, unless the member of the public with whom it is associated has affirmatively consented to its release. The city must release the remaining submitted information to the requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

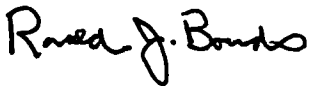
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 181451

Enc. Marked documents

c: Mr. Rand J. Riklin  
Goode Casseb Jones Riklin Choate & Watson  
P.O. Box 120480  
San Antonio, Texas 78212-9680  
(w/o enclosures)

Mr. John E. Clark  
Goode Casseb Jones Riklin Choate & Watson  
P.O. Box 120480  
San Antonio, Texas 78212-9680  
(w/o enclosures)

Mr. Todd Bensman  
Staff Writer  
The Dallas Morning News  
P.O. Box 655237  
Dallas, Texas 75265  
(w/o enclosures)

Mr. Jonathan Neerman  
Jenkins & Gilchrist  
1445 Ross Avenue, Suite 3200  
Dallas, Texas 75202  
(w/o enclosures)

Ms. DeMetris A. Sampson  
Linebarger Goggan Blair Pena & Sampson, L.L.P.  
2323 Bryan St., University Center, Suite 1720  
Dallas, Texas 75201  
(w/o enclosures)

Mr. Kent M. Rider  
Linebarger Goggan Blair & Sampson, LLP  
P.O. Box 17428  
Austin, Texas 78760  
(w/o enclosures)